ZARINA SULEYMANOVA & ORS v. MARIA BRENDA OSOWIECKI & ORS

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[CIVIL SUIT NO: BA-22NCVC-507-12-2023]
24 DECEMBER 2024

Abstract – *(i) The degree of supervision by parents on minors depends on the circumstances of each case and the applicable test is that of reasonable foreseeability. Parents are not obligated to be watching minors when reasonable foreseeability of harm does not exist; (ii) When the impugned defamatory statements are not pleaded in the original statement of claim, the affected party has every right to file an application to strike out the statement of claim; (iii) When an application to amend a statement of claim is filed one day before the hearing, this can be seen as a tactical manoeuvre to delay the disposal of a case. Such application ought to be dismissed.*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out statement of claim – Whether there was valid cause of action for defamation – Impugned defamatory statements not pleaded in original statement of claim – Claim on negligence of parents' failure to supervise minors drinking alcohol at their residence – Whether there was reasonable foreseeability of harm – Whether there was failure to mitigate unfounded/unproven allegations from spreading in community – Whether statement of claim ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)*

CIVIL PROCEDURE: *Statement of claim – Amendment – Application to amend – Filing of application one day before hearing date – Whether tactical manoeuvre to delay hearing – Failure to state contemplation of application to amend statement of claim during case managements – Whether application ought to be dismissed*

TORT: *Negligence – Allegation of – Claim on negligence of parents' failure to supervise minors drinking alcohol at their residence – Whether there was reasonable foreseeability of harm – Whether there was failure to mitigate unfounded/unproven allegations from spreading in community – Whether there was failure to demonstrate how spreading of allegations could be contained or mitigated*

The third plaintiff and the third defendant were both minors. On 20 May 2023, the third plaintiff was invited for a stayover at the defendants' residence. According to the plaintiffs, during the evening and early hours of the following day, both underaged individuals consumed alcoholic beverages, resulting in the third defendant becoming intoxicated while the third plaintiff remained sober. The plaintiffs averred that the third defendant later became unconscious due to excessive drinking. When the third plaintiff

and the third defendant returned to school on 22 May 2023, the plaintiffs alleged that the third defendant had spread false rumours that the third plaintiff had 'raped' the third defendant, leading to severe cyber bullying and ostracisation. The plaintiffs claimed that the third plaintiff was teased, laughed at and even called numerous unsettling homosexually related derogatory terms and descriptions. This purportedly led to the third plaintiff being cyberbullied, and eventually, to the third plaintiff's move to another school. As a result of the above events, the plaintiffs filed the present suit (Suit 507) against the defendants. The plaintiffs' claims against the defendants were (i) as against the third defendant, a claim on defamation arising from the purported rumour that the third plaintiff had raped the third defendant, which rumour was purportedly spread in and out of the school ('claim 1'); (ii) as against the first and second defendants, a claim on negligence in their capacity as the parents for their purported failure to supervise the third plaintiff and the third defendant, which failure purportedly led to the third plaintiff and the third defendant consuming alcoholic beverage at the defendants' residence ('claim 2'); and (iii) as against the first and second defendants, a claim on negligence in their capacity as the teachers for their purported failure to supervise, specifically, in mitigating or containing the spread of rumours in and out of the school ('claim 3'). There were two interlocutory applications before this court. In encl. 13, the defendants applied for the plaintiffs' statement of claim against them to be struck out pursuant to O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the court, premised on the ground that the plaintiffs had failed to properly make out a valid cause of action for defamation by (i) failing to state the precise defamatory words which were spoken/published by the third defendant in purportedly spreading the 'false rumours and/or allegations' in relation to the third plaintiff; and (ii) failing to state to whom the third defendant had spoken the alleged defamatory words to and/or where the third defendant had allegedly published any defamatory statement in relation to the third plaintiff. In encl. 36, the plaintiffs applied to amend their statement of claim, justifying this amendment on the grounds that it aimed to provide greater clarity regarding the defamatory statements made by the defendants and to furnish further particulars about their publication. The plaintiffs asserted that the amendments were essential for a more precise articulation of the nature and extent of the defamatory acts, enabling this court to fully grasp the severity of the harm inflicted upon the plaintiffs.

Held (allowing encl. 13; dismissing encl. 36):

(1) As to whether the second and third defendants were negligent, as parents to supervise the third plaintiff and the third defendant, the parents could not be watching the third plaintiff and the third defendant throughout the stayover, nor was there any obligation on them to do so. There did not exist a reasonable foreseeability of harm when the third plaintiff was

invited over to the defendants' residence for a sleepover. The first and second defendants' application to strike out claim 2 was allowed. (paras 43-46)

(2) As to the purported failure of the first and second defendants to '… contain and/or mitigate the unfounded/unproven allegations from spreading in the community of the school and elsewhere …', if indeed the alleged unfounded and/or unproven allegations had spread in the community of the school and elsewhere, the plaintiffs had failed to demonstrate how the spreading of the allegations could have been contained or mitigated. The first and second defendants' application in encl. 13 to strike out claim 3 was allowed. (paras 52 & 53)

(3) As the impugned defamatory statements were not pleaded in the original statement of claim, the defendants had every right to file their application in encl. 13 to strike out the statement of claim. From the time of the filing of encl. 13 until the hearing of the application in encl. 36 to amend the statement of claim – an interval of approximately six months – no less than five case managements were conducted for this suit. At none of these case managements did the plaintiffs state that they were contemplating an application to amend the statement of claim, (paras 78 & 81)

(4) Enclosure 36 was only filed one day before the hearing date of encl. 13. Coupled with the fact that the plaintiffs had only previously caused the hearing of encl. 13 to be adjourned on at least two occasions, this court was persuaded by the argument that this was a tactical manoeuvre to delay the hearing of encl. 13 and/or to delay encl. 13's disposal. The application in encl. 36 ought not to succeed (paras 82-84)

(5) Although the plaintiffs' claim in defamation was bound to fail based on the original statement of claim, it was always open to the plaintiffs to make the relevant amendments. The plaintiffs would not have been denied the opportunity to amend the statement of claim had they done so before or immediately after the filing of encl. 13. However, the plaintiffs chose to file their application on the eve of the hearing on encl. 13. They were to bear the consequences. (para 85)

Case(s) referred to:

Ahmad Ikhwan Ahmad Fauzi v. Mohd Fahimi Endut (Father And Next Of Kin To Ahmad Safwan Hanim Mohd Fahimi) & Ors And Another Appeal [2024] 5 CLJ 1 FC ***(refd)***

Azman Sulaiman v. Muhammad Aqil Afdhal Ruslan (A Child Suing Through His Father And Next Friend; Ruslan Disa) & Anor [2018] 3 CLJ 241 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Carmarthenshire County Council v. Lewis [1955] AC 549 ***(refd)***

CC Ng & Brothers Sdn Bhd v. Government Of The State Of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45 FC ***(refd)***

Clarapede & Co v. Commercial Union Association 32 WR 262 ***(refd)***
Credit Guarantee Corporation Malaysia Bhd v. SSN Medical Products Sdn Bhd [2017] 6 CLJ 129 CA ***(refd)***
Donaldson v. McNiven [1952] 2 All ER 69114 ***(refd)***
Government Of Malaysia & Ors v. Jumat Mahmud & Anor [1977] CLJU 29; [1977] 1 LNS 29 FC ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606 HC ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Lim Nyang Tak Michael v. Ace Technologies Sdn Bhd [1995] CLJU 118; [1995] 1 LNS 118 HC ***(refd)***
Loke Seng Fuat & Anor v. Goh Boon Lee [2023] CLJU 1405; [2023] 1 LNS 1405 HC ***(refd)***
Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors [1982] CLJ 150; [1982] CLJ (Rep) 232 FC ***(refd)***
Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***
Tiow Weng Theong v. Melawangi Sdn Bhd [2019] 2 CLJ 655 CA ***(refd)***
United Overseas Bank (China) Ltd, Chengdu Branch v. Siow Kwang Joon [2020] CLJU 1440; [2020] 1 LNS 440 HC ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Childs Act 2001, ss. 31, 33
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 20 r. 5(1)

Other source(s) referred to:
ER Alexander, Tort Responsibility of Parents and Teachers for Damage Caused by Children The University of Toronto Law Journal, Vol 16, No 1 (1965), pp 165, 166, 167, 168, 169, 170, 171, 172

For the plaintiffs - Muhammad Farhan Muhammad Shafee; M/s Shafee & Co
For the defendants - Mohamed Amir Shahmi Mohamed Nazir; M/s Izral Partnership

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JUDGMENT

Choong Yeow Choy JC:

Introduction

[1] A sleepover is something children often eagerly anticipate, creating cherished memories that last a lifetime. However, in the present case, what began as an innocent stayover quickly turned nightmarish – leading to the end of a friendship and the beginning of legal battles in court.

The Parties And The Salient Facts

[2] The third plaintiff and the third defendant, who are both minors, were friends attending the Alice Smith School.

[3] The first and second plaintiffs are the third plaintiff's parents and the first and second defendants are the third defendant's parents.

[4] On 20 May, 2023, the third plaintiff was invited for a stayover at the defendants' residence. According to the plaintiffs, during the evening and early hours of the following day, both underage individuals consumed alcoholic beverages, resulting in the third defendant becoming intoxicated while the third plaintiff remained sober. The plaintiffs averred that the third defendant later became unconscious due to excessive drinking, prompting the third plaintiff to clean the room with the assistance of the third defendant's brother.

[5] Despite the prior incident, the next day unfolded normally, with both attending a mall and watching a movie. When the third plaintiff and the third defendant returned to school on Monday, 22 May, 2023, the plaintiffs alleged that the third defendant spread false rumours that the third plaintiff had "raped" the third defendant, leading to severe cyberbullying and ostracization. The plaintiffs claimed that the third plaintiff was teased, laughed at and even called numerous unsettling homosexually related derogatory terms and descriptions.

[6] The defendants' version was that the third defendant had brought alcoholic beverages without the knowledge of the first and second defendants to the sleepover and after the first and second defendants had gone to bed, the third plaintiff and the third defendant consumed the alcoholic beverages, leading to their intoxication. The defendants further averred that the following school day, a rumour purportedly spread in and/or out of the school (as alleged by the third plaintiff) that the third plaintiff had raped the third defendant; and this purportedly led to the third plaintiff being cyberbullied, and eventually, to the third plaintiff's move to another school.

The Ensuing Suits

[7] As of results of the above events, the plaintiffs filed the present suit (Suit 507) against the defendants.

[8] The plaintiffs has also filed a separate suit (Suit 508) against The Alice Smith Schools Association, Sian May and the Maria Brenda Osowiecki (the first defendant in Suit 507). Suit 508 is premised on the tort of negligence.

[9] In this present suit, the plaintiffs' claims against the defendants can be summarised as follows:

> Claim 1: as against the third defendant, a claim on defamation arising from the purported rumour that the third plaintiff had raped the third defendant, which rumour was purportedly spread in and out of the school;

A Claim 2: as against the first and second defendants, a claim on negligence in their capacity as the parents for their purported failure to supervise the third plaintiff and the third defendant, which failure purportedly led to the third plaintiff and the third defendant consuming alcoholic beverage at the defendants' residence; and

B Claim 3: as against the first and second defendants, a claim on negligence in their capacity as the teachers for their purported failure to supervise, specifically in mitigating or containing the spread of rumours in and out of the school.

C **[10]** There are two interlocutory applications before this court. The first is defendants' application in encl. 13 to strike out the plaintiffs' statement of claim. The second is the plaintiffs' application in encl. 36 to amend the statement of claim.

The Striking Out Application In Encl. 13

D **[11]** The defendants have applied for the plaintiffs' statement of claim against them to be struck out pursuant to O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of this court.

The Third Defendant's Striking Out Application

E **[12]** The third defendant's main contention in support of his application to strike out the plaintiffs' claim (claim 1) is premised on the ground that the plaintiffs have failed to properly make out a valid cause of action for defamation in the statement of claim by:

(i) failing to state the precise defamatory words which were
F spoken/published by the third defendant in purportedly spreading the "false rumours and/or allegations" in relation to the third plaintiff; and

(ii) failing to state to whom the third defendant had spoken the alleged defamatory words to and/or where the third defendant had allegedly published any defamatory statement in relation to the third plaintiff.

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[13] This application has, to all intents and purposes, been superseded by another event – namely, the plaintiffs' application in encl. 36 to amend their statement of claim. The plaintiffs justified this amendment on the grounds that it aims to provide greater clarity regarding the defamatory statements
H made by the defendants and to furnish further particulars about their publication.

[14] In encl. 36, the plaintiffs asserted that the amendments are essential for a more precise articulation of the nature and extent of the defamatory acts, enabling this court to fully grasp the severity of the harm inflicted upon the
I plaintiffs.

[15] The decision of this court re the plaintiffs' application in encl. 36 will directly impact the third defendant's striking out application in relation to claim 1.

The First And Second Defendants' Striking Out Application

[16] In relation to the plaintiffs' negligence claim (claim 2), it was contended by the second and third defendants that there is no duty of care which can be imposed on them as parents to constantly supervise the third defendant and the third plaintiff and for them to be continually aware of the third defendant's and the third plaintiff's activities and movements at all times during the alleged events on 22 May, 2023.

[17] As for claim 3, it was the second and third defendants' submission that the law does not impose any duty on them as teachers to contain and/or mitigate the false allegations/rumours allegedly spread by the third defendant from further spreading within the community and the plaintiffs' allegations in relation to this alleged breach of duty are devoid of material particulars.

[18] This court shall first deal with the first and second defendants' striking out application in relation to claims 2 and 3.

The Overriding Issues In The Second And Third Defendants' Striking Out Application

[19] The plaintiffs have alleged in their statement of claim that the second and third defendants have been negligent in failing to supervise the third plaintiff and the third defendant and that lack of supervision led to the third plaintiff and the third defendant consuming alcoholic beverages at the defendants' residence.

[20] Hence, the issues are first, whether the second and third defendants owe such a duty of care and if the answer is in the affirmative, whether they had breached that duty of care.

[21] The plaintiffs have also asserted in their statement of claim that the second and third defendants were negligent in their capacity as the teachers in failing to supervise, specifically in mitigating or containing the spread of rumours in and out of the school.

[22] Such a claim raises a corresponding and similar issue of whether the second and third defendants owe such a duty of care and if the answer is in the affirmative, whether they had breached that duty of care.

The Parties' Contentions Re Claim 2

[23] As far as the striking out of claim 2 is concerned, the second and third defendants relied primarily on the English Court of Appeal case of *Donaldson v. McNiven* [1952] 2 All ER 69114 ('*Donaldson*') for the propositions that no parent can watch their child all day, every day, nor is there any obligation on the part of the parent to do so and that no parent can be responsible for the torts of their children.

[24] The second and third defendants also cited the case of *Azman Sulaiman v. Muhammad Aqil Afdhal Ruslan (A Child Suing Through His Father And Next Friend; Ruslan Disa) & Anor* [2018] 3 CLJ 241; [2017] 2 PIR [48]; [2017] MLJU 1505; [2017] MLRHU 1058 (which also cited *Donaldson* with approval) which they claimed, made it clear that "… to impose responsibility on the parent to be aware of a child's every movement … every second of the day is something beyond what is humanly impossible (SIC) …".

[25] Since claim 2 rests solely on the purported failure of the first and second defendants to supervise the third plaintiff and the third defendant at their residence, the first and second defendants urged this court to strike out claim 2 on the strengths of the above authorities.

[26] The main thrust of the plaintiffs' contention to oppose the first and second defendants' striking out application of claim 2 is premised on the principle that the degree of supervision depends on the circumstances of each case.

[27] The plaintiffs submitted that there existed a reasonable foreseeability of harm to the third plaintiff who was entrusted to the care of the first and second defendants, thereby resulting in the plaintiffs having a reasonable cause of action in negligence against the defendants. That being the case, claim 2, according to the plaintiffs, should not be struck out by this court as the striking out of an action without the benefit of *viva voce* evidence during a trial is a drastic power.

[28] The plaintiffs further relied on a number of provisions of the Childs Act 2001 that relate to parental responsibility. The plaintiffs made reference to s. 31 of the Act which prohibits ill-treatment, abuse, neglect, abandonment, exposure and negligence towards children and s. 33, where it is an offence when a parent or guardian leaves a child without reasonable supervision.

The Respective Submissions Re Claim 3

[29] It was the first and second defendant's submission that "notwithstanding that the second defendant is not a teacher at the school, claim no. 3 ought to be struck out as the pleaded acts and/or omission of the first and second defendants do not fall within the limited scope of the duty to supervise which teachers generally owe".

[30] The first and second defendants acknowledged the decision of the Federal Court in *Mohd Raihan Ibrahim & Anor v. The Government Of Malaysia & Ors* [1982] CLJ 150; [1982] CLJ (Rep) 232; [1981] 2 MLJ 27; [1980] 1 MLRA 10 ('*Mohamed Raihan*') (which authority was relied on by the plaintiffs in pursuing this claim). However, the first and second defendants were quick to point out that a teacher's duty to supervise is not as wide-ranging. Instead, they referred this court to another Federal Court

decision, *Government Of Malaysia & Ors v. Jumat Mahmud & Anor* [1977] CLJU 29; [1977] 1 LNS 29; [1977] 2 MLJ 103; [1977] 1 MLRA 276 ('*Jumat Mohamed*'). In this latter case, the Federal Court had remarked that "there is a world of difference between the use of a changkol and that of a pencil". A

[31] As noted, in opposing the first and second defendants' striking out application of claim 3, the plaintiffs relied on *Mohamed Raihan*. This was a decision of the Federal Court and the passage that the plaintiffs have referred to is as follows: B

> It is settled law that a school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of supervision depends on the circumstances of each case, such as the age of the pupils and what they are doing at the material time. If the teacher knows that the pupils are engaged in doing acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of the acts. C

[32] A case on the extent of parental responsibility, not cited by the parties, is the House of Lords decision in *Carmarthenshire County Council v. Lewis* [1955] AC 549, where the responsibility of teachers has been equated to that of parents. D

[33] This case involved a determination of the extent of a nursery school's duty to supervise and control the conduct of one of its pupils. The defendant conducted a nursery school. A four-year-old boy – momentarily left unattended by his teacher, while she looked after an injured child – wandered out of the classroom and school building and through an unlocked playground gate onto the highway. The plaintiff's husband was killed, when he swerved his truck to avoid hitting the boy. At the trial, the plaintiff succeeded: the teacher had been negligent in leaving the child unattended, even for a short period of time. The trial judgment was affirmed by the English Court of Appeal. The House of Lords affirmed the result in the lower courts, but not the reason. The defendant was liable, not because the child was left unattended, but because the gate from the playground to the street was left open, or so easy to open that a child of four could open it. (See *E. R. Alexander, Tort Responsibility of Parents and Teachers for Damage Caused by Children The University of Toronto Law Journal*, Vol. 16, No. 1 (1965), pp. 165 to 172.) E F G

The Law And The Applicable Principles H

[34] The power of this court to strike out a claim is found under O. 18 r. 19 of the Rules of Court 2012 which states as follows:

> Striking out pleadings and endorsements (O. 18, r. 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that – I

A (a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

B (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[35] There is no doubting that this power is a drastic one and should be C exercised very sparingly and only in very exceptional cases (*CC Ng & Brothers Sdn Bhd v. Government Of The State Of Pahang* [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347; [1984] 1 MLRA 546.

[36] In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36; [1993] 1 MLRA D 611, Mohamad Dzaiddin SCJ (as His Lordship then was) held that:

> It is only in plain and obvious cases that recourse should be had to summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer can only E be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

[37] Other authorities that have reiterated and underscored this principle include *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 3 AMR 2458; [1997] 2 MLJ 565; [1997] 1 MLRA 284 and *Sivarasa* F *Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 AMR 20; [2012] 1 MLJ 473; [2011] 1 MLRA 813.

The Decision Of This Court Re The Striking Out Of Claim 2

[38] The particulars of negligence as pleaded by the plaintiffs re claim 2 are G as follows:

(i) the first and second defendant failed in their duty of care to properly supervise the third defendant and the third plaintiff by not providing them a safe environment to be at the defendants' house, the third plaintiff being a guest or licensee to the defendants' house;

H (ii) the first and second defendant failed in their duty of care and to properly supervise both minors, the third defendant and third plaintiff, by allowing them to have various alcoholic drinks in the defendants' premise;

(iii) the first and second defendant failed in their duty of care to make any I attempts to mitigate or stop the incident of alcohol consumption by the two children;

(iv) the first and second defendant failed in their duty of care under the Child Act 2001 in allowing the third plaintiff and third defendant to be in a dangerous situation where underaged drinking was allowed on their premises; and

(v) In addition, the first defendant being the school principal and the second defendant being a school teacher had clearly a much higher standard of care towards the third plaintiff in ensuring his safety and well-being in which they have clearly breached.

[39] In *Donaldson*, the plaintiff, through his father as next friend, claimed damages from the defendant for personal injuries sustained through the negligent discharge of an air rifle by the defendant's thirteen-years old son. It was not contended that the defendant was negligent in allowing his son to have the use of an air rifle, but it was contended that he was negligent in not exercising proper supervision over his son's use of the rifle. Pearson J held that the defendant had not been guilty of negligence.

[40] The Court of Appeal affirmed the decision of Pearson J Lord Goddard CJ said:

> The case was put entirely on lack of supervision, but how are you going to supervise a small boy for every hour of the day? If there was nothing wrong in the defendant allowing his son to have an air-gun (and I am far from saying there was anything wrong), I cannot see that he could do more than extract a promise from his son never to use the air-gun in the street. He cannot be watching his son all day and every day, nor is there any obligation on him as a parent to do so. Some people have thought that parents ought to be responsible for the torts of their children, but they are not. The negligence in this case was merely the negligence of the boy. On the findings of the learned judge the parents had done all that parents could reasonably do, and I can see no ground for imputing negligence to the father. Therefore, this appeal fails.

[41] Birkett LJ was of the same opinion and His Lordship expressed his views as follows:

> The moment it was conceded in this court (as counsel for the plaintiff frankly did concede) that it could not be a negligent act on the part of the defendant to allow his boy to be in possession of an air-gun, the only question for consideration was whether the conduct of the defendant was that of a reasonable and prudent father? The judgment of the learned judge shows conclusively that to that question he gave the greatest possible care, and he came to the conclusion that the facts did not justify him in finding negligence against the defendant.

[42] As in *Donaldson*, it was not contended by the plaintiffs, for that would be preposterous, that the second and third defendants were negligent in "permitting" the sleepover at their residence. Thus, the sole question is whether they were negligent, as parents, to supervise the third plaintiff and the third defendant.

[43] This court agrees with the statement by Lord Goddard CJ that as parents, they cannot be watching the third plaintiff and the third defendant throughout the stayover, nor is there any obligation on them as parents to do so.

[44] This court is also unable to agree that there existed a reasonable foreseeability of harm when the third plaintiff was invited over to the defendants' residence for a sleepover.

[45] Last but not least, this court is of the considered view that the plaintiffs' reliance on ss. 31 and 33 of the Child Act 200119 is misconceived. These provisions relate to criminal offences which have very different considerations compared to the civil action here.

[46] Based on the above authorities and findings, the first and second defendant's application to strike out claim 2 is allowed.

The Decision Of This Court Re The Striking Out Of Claim 3

[47] It is the plaintiffs' pleaded case that:

(i) the first and second defendants further failed in protecting the third plaintiff where, the first and second defendant allowed the abhorrent rumours of "rape" and sexual innuendoes to occur and be spread by the third defendant in the school and international school community;

(ii) the first defendant and second defendant breached their duty of care towards their guest, the third plaintiff, when they allowed the rumours to start and spread;

(iii) the first and second defendants have further breached their duty of care and trust of the first and second plaintiff by allowing the rumours of "rape" and sexual innuendos to begin and be spread in school and the international school community damaging the reputation of the plaintiffs particularly the third plaintiff; and

(iv) the defendants collectively caused and/or contributed to the third plaintiff being subjected to cyberbullying, hate and emotional distress as a result of the false and defamatory statements made by the third defendant.

[48] This court is bound by the principles as laid down by the Federal Court in *Jumat bin Mohamed and Mohamed Raihan*. In the former, it was held as follows:

> It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father

with a very large family would take of his own children (see *Ricketts v. Erith Borough Council* [1943] 2 All ER 629 631. It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards v. State of Victoria* [1969] VR 139 141 when he said:

> The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which *ex hypothesi* (the teacher) should reasonably have foreseen.

[49] The material ingredients which form the duty to supervise owed by teachers as elucidated in *Mohamed Raihan* and *Jumat bin Mohamed* are as follows:

(i) the duty to supervise is a duty of prevention; and

(ii) the type of injury sought to be prevented is a physical injury.

[50] In the recent case of *Ahmad Ikhwan Ahmad Fauzi v. Mohd Fahimi Endut (Father And Next Of Kin To Ahmad Safwan Hanim Mohd Fahimi) & Ors And Another Appeal* [2024] 5 CLJ 1; [2024] 3 AMR 825; [2024] 3 MLJ 192; [2024] 4 MLRA 91, a case that also involved physical injury, the Federal Court reaffirmed what it had earlier propounded as follows:

> [42] We have already expressed views to this effect in *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor* and *Mohamed Raihan bin Ibrahim & Anor v. Government of Malaysia & Ors*, that by reason of the special relationship between teachers and similar personnel and the student, the teachers owe a duty to the student to take reasonable care for the safety of the student. School teachers and other similar personnel are under a duty to supervise the students when the students are within the school, for the ultimate purpose of maintaining discipline, safety and well-being of the students. The degree of supervision depends on the circumstances of each case – see *Mohamed Raihan bin Ibrahim & Anor v. Government of Malaysia & Ors.*

[51] The key takeaway is that the degree of supervision depends on the circumstances of each case and the applicable test is that of reasonable foreseeability.

[52] Claim 3 is not based on the purported failure of the first and second defendants to prevent an injury on the third plaintiff, but rather, the purported failure of the first and second defendants to "… contain and/or mitigate the unfounded/unproven allegations from spreading in the community of the school and elsewhere …", as per the plaintiffs' pleaded case at para. 42 of their statement of claim.

[53] If indeed the alleged unfounded and/or unproven allegations had spread in the community of the school and elsewhere, the plaintiffs have failed to demonstrate how the spreading of the allegations could have been contained or mitigated. In the upshot, the first and second defendants' application in encl. 13 to strike out claim 3 is allowed.

The Plaintiffs' Application To Amend The Statement Of Claim In Encl. 36

[54] This application by the plaintiffs to amend the statement of claim relates to the defamation claim (claim 1).

[55] The notice of application in encl. 36 was filed on 19 August 2024. Prior to that, on 20 February 2024, the defendants had filed a notice of application in encl. 13 to strike out the plaintiffs' statement of claim under O. 18 r. 19(1)(a), (b), (c), and/or (d) of the Rules of Court 2012.

[56] The plaintiffs' original pleaded case re claim 1 were as follows:

> 21. The next day, on Monday 22.05.2023, during the morning school recess, an incident transpired wherein the 3rd Defendant, in the midst of a group of fellow students, rather abruptly and violently, forcefully applied a headlock to the neck of the 3rd Plaintiff. This forceful headlock momentarily impeded the 3rd Plaintiff's ability to breathe normally. It is important to note that the 3rd Defendant held a significantly larger stature, measuring 6 feet 1 inch at the time, in stark contrast to the 3rd Plaintiff's modest height of 5 feet 8 inches. The 3rd Plaintiff failed to understand the reason for the 3rd Defendant irrational behaviour.
>
> 22. After that incident, the 3rd Defendant then spread a false rumour that the 3rd Plaintiff had "raped" the 3rd Defendant, namely that the 3rd Plaintiff had allegedly performed oral sex on the 3rd Defendant. The rumour spread like wildfire throughout the school and reached the international community of international school children elsewhere, as would be expected. It became clearer later from the inference of the derogatory messages received by the 3rd Plaintiff, that the alleged "rape" was in fact the said purported act of fellatio, clearly a non-sequitur, and an allegation that the 3rd Plaintiff refutes.

[57] The proposed amendments provided additional details as to what have been pleaded in paras. 21 and 22 above and added three new paragraphs, namely 22A, 22B and 22C. These proposed amendments, as explained by the plaintiffs, were made with the twin objectives of providing clarity to the defamatory statements and of providing further particulars about their publication.

The Poser In Encl. 36

[58] The issue for determination in encl. 36 is straightforward. The question is whether the additional particulars in the original paras. 21 and 22 of the statement of claim and the new paras. 22A, 22B and 22C to the statement of claim ought to be allowed.

The Applicable Law And Principles

[59] The legal principles in relation to amendment of pleadings are trite.

[60] While the classic statements of Brett MR in *Clarapede & Co v. Commercial Union Association* 32 WR 262 that:

> However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

remain indubitable, we should not lose sight of the provision in O. 20 r. 5(1) of the Rules of Court 2012 and the leading cases of *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213; [1982] 1 MLRA 417 ('*Yamaha Motor Co*') and *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301; [2016] 3 MLRA 81 ('*Hong Leong Finance*').

[61] Leave to amend writ or pleadings ought to be granted unless

(i) the amendment is not *bona fide*;

(ii) the amendment will cause prejudice which cannot be compensated by costs;

(iii) the amendment will turn the suit from one character into a suit of another and inconsistent character;

(iv) the amendment is one which is futile or frivolous;

(v) the amendment is to withdraw an admission consciously made;

(vi) the amendment is made after an inordinate and inexcusable delay;

(vii) the amendment is to raise a cause of action which only accrued to the plaintiff after the action had been commenced;

(viii) the amendment is to add a party after limitation has set in; or

(ix) the amendment is to add a cause of action after limitation has set in.

In other words, the above serve as exceptions to the general rule that adopts the liberal approach in permitting courts to grant leave to parties to amend their writ and pleadings.

A **The Respective Contentions**

[62] In support of their application in encl. 36, the plaintiffs justified the proposed amendments on the grounds of, *inter alia*:

(i) providing further particulars as to the overall allegation of rape;

B (ii) providing greater clarity regarding the defamatory statements made by the defendants;

(iii) furnishing further particulars about the publication of the defamatory statements;

C (iv) ensuring a more precise encapsulation of the nature and scope of the defamatory acts, thereby allowing the court to fully appreciate the gravity of the harm caused to the plaintiff;

(v) demonstrating the nature publication was made; and

D (vi) demonstrating the extent of publication and the various permutations the defamatory statement has resulted in.

[63] The plaintiffs also argued that this application made early in the proceedings for the following reasons:

(i) parties are still in the interlocutory stage;

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(ii) no pre-trial directions have been issued yet including bundles of documents and witness statements;

(iii) no dates for trial have been scheduled yet; and

F (iv) no prejudice to the substantive action has been occasioned that cannot be addressed by costs.

[64] The plaintiffs denied that the amendments are sought as a strategic tactic to disadvantage the defendants or to alter the course of the proceedings unfairly.

G **[65]** The plaintiffs further underscored their contention that the amendments sought do not change the nature of the claim as they merely add the words uttered, where it had occurred and the particulars of publication. In other words, the amendments sought to substitute what was pleaded in summary to *verbatim*.

H **[66]** The defendants opposed the amendments sought in encl. 36 on the following grounds, namely:

(i) Encl. 36 is not made *bona fide* and is nothing more than a tactical manoeuvre to circumvent the defendants' application to strike out the statement of claim ('encl. 13') and/or to delay the disposal of the same;

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(ii) the proposed amendments sought in encl. 36 are ineffective and does not, in any event, save the plaintiffs' statement of claim;

(iii) the proposed amendments sought in encl. 36 would change the nature and character of the plaintiffs' action; and

(iv) enclosure 36 would cause prejudice to the defendants which cannot be compensated with costs

[67] In relation to the first ground, the defendants referred this court to numerous authorities and these include:

(i) *Lim Nyang Tak Michael v. Ace Technologies Sdn Bhd* [1995] CLJU 118; [1995] 1 LNS 118; [1995] 4 MLJ 616, where the defendant's application to amend its defence was filed five days before the hearing of the plaintiff's summary judgment application.;

(ii) *United Overseas Bank (China) Ltd, Chengdu Branch v. Siow Kwang Joon* [2020] CLJU 1440; [2020] 1 LNS 1440, where the defendant only filed its application to amend pleadings when parties were in the midst of complying with directions for filing of written submissions for the plaintiff's summary judgment application; and

(iii) *Loke Seng Fuat & Anor v. Goh Boon Lee* [2023] CLJU 1405; [2023] 1 LNS 1405, where the High Court affirmed the decisions of the Sessions Court Judge in dismissing the plaintiffs' amendment application and allowing the striking out of the plaintiffs' claim. In that case, the amendment application was regarded as a tactical manoeuvre, filed only after the striking out application by the defendants.

This Decision Of This Court

[68] This court shall first deal with the defendants' submission that the proposed amendments sought in encl. 36 would change the nature and character of the plaintiffs' action. When queried on this ground at the hearing, the counsel for the defendants argued that the proposed amendments, if allowed, would raise a new allegation on sexuality.

[69] This court does not consider the above argument as a valid ground to oppose the amendments sought. The plaintiffs have pleaded as follows in para. 40(a) of their statement of claim:

40. the natural and ordinary meanings as well as the implied/innuendo meaning of the defamatory statements carry defamatory imputations against the third plaintiff. In particular, the defamatory statements, by the natural and ordinary meanings as well as the implied meanings are understood to mean as follows:

(a) that the third plaintiff is of a homosexual orientation;

…

[70] Hence, this court holds the opinion that the proposed amendments will not turn the suit from one character into a suit of another and inconsistent character.

[71] The defendants have also raised the argument that the amendments sought in encl. 36 are ineffective and does not, in any event, save the plaintiffs' statement of claim. This is the futile or frivolous exception.

[72] Upon a close examination of the particulars to be added in the proposed amendments, this court is unable to agree with the defendants that the proposed amendment, if allowed, will "not save the plaintiffs' statement of claim". While the original statement of claim run afoul of established principles requiring the exact impugned defamatory statements to be reproduced/pleaded, it cannot be said with certainty that the proposed amendments, if allowed, will contravene the principle as laid down by the Court of Appeal in cases such as *Credit Guarantee Corporation Malaysia Bhd v. SSN Medical Products Sdn Bhd* [2017] 6 CLJ 129; [2017] 1 AMR 481; [2017] 2 MLJ 629; [2017] 1 MLRA 541 ('*Credit Guarantee Corp Malaysia*') and *Tiow Weng Theong v. Melawangi Sdn Bhd* [2019] 2 CLJ 655; [2018] 5 AMR 465; [2018] 6 MLJ 761; [2018] 6 MLRA 52 ('*Tiow Weng Theong*').

[73] This brings us to the delay, lack of *bona fide* and tactical manoeuvre grounds.

[74] To recap, the plaintiffs did argue that first, this application in encl. 36 was "made early in the proceedings" as first, "the parties are still in the interlocutory stage"; second, "no pre-trial directions have been issued yet including bundles of documents and witness statements"; third, no dates for trial have been scheduled yet"; and fourth, "no prejudice to the substantive action has been occasioned that cannot be addressed by costs".

[75] However, the plaintiffs did concede/acknowledge in the course of their submissions as follows:

> First, that "the delay in filing this amendment application is not due to any negligence or disregard of procedure but rather due to the evolving discovery of key aspects of the case, further information and the deepened understanding of the case's complexity"; and
>
> Again, "it is acknowledged that the lateness of the application … . The proposed amendments are crucial for the case to be adjudicated on its merits, and denying the amendment purely due to timing would result in an incomplete representation of the facts.

[76] The more pertinent point which this court considers as pivotal to encl. 36 is the tactical manoeuvre ground.

[77] The Federal Court in *Hong Leong Finance* had this to say when alluding to the ground of tactical manoeuvre.

TACTICAL MANOEUVRE

[28] Another factor which our courts have taken into consideration is whether the amendment application was made as a tactical manoeuvre. In the Court of Appeal case of *Everise Hectares Sdn Bhd v. Citibank Berhad* the amendment application was disallowed as the application was a tactical manoeuvre to delay and prevent the respondent bank from completing the sale of land. In the case of *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 2 CLJ 632 the amendment application was disallowed as that amendment was made to circumvent the striking out application of the original writ and the statement of claim

[78] In the context of the present application, as the impugned defamatory statements were not pleaded in the original statement of claim, the defendants had every right to file their application in encl. 13 to strike out the statement of claim. The defendants were entitled to rely on *Credit Guarantee Corp Malaysia* and *Tiow Weng Theong.*

[79] In *Credit Guarantee Corp Malaysia*, the Court of Appeal held as follows:

[45] In this regard, it is settled law that in libel and slander, the very words complained of, whether stated orally or published, are the facts on which the action is grounded. In other words, these are material facts which must be pleaded so that the defendant knows the precise charge against him and is then able to defend himself against it. It is insufficient to merely describe their substance, purpose or effect. It is essential to set out the actual words used so that the court can then decide, as a matter of law, whether the said words whether oral or published give rise to the defamatory imputations alleged (see *Harris v. Warre* (1879) 4 CPD 125; Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377; *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523; and *Dato' V Kanagalingam v. David Samuels & Ors* [2006] 6 MLJ 521).

[80] This was reaffirmed in *Tiow Weng Theong* where the Court of Appeal held as follows:

[82] With respect, we differ from the learned JC's conclusion for the following reasons:

(a) as submitted by learned counsel for the defendant, the law in relation to pleadings in a defamation case is clear. The allegedly defamatory words should be set out in verbatim in the particulars of claim and usually in the form of a quotation. A description or summary of the content, purport or effect is insufficient (see *Gatley on Libel and Slander* (11th Ed) at para 28.11);

(b) this is borne out by the decision of this court in *Credit Guarantee Corp Malaysia Bhd v. SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629; [2017] 6 CLJ 129:

> … the very words complained of, whether stated orally or published, are the facts on which the action is grounded. In other words these are material facts which must be pleaded so that the defendant knows the precise charge against him and is then able to defend himself against it … It is essential to set out the actual words used so that the court can then decide, as a matter of law, whether the said words whether oral or published give rise to the defamatory imputations alleged …'; and
>
> (c) in the instant case there was only one allegedly defamatory statement pleaded in verbatim and in the form of a quotation.
>
> [83] Accordingly it follows that any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon. The learned JC in this regard erred in allowing the plaintiff to adduce additional alleged defamatory statements in verbatim and in the form of quotations mid trial and even after trial. This amounts to a breach of natural justice as the defendant was not able to meet the case of the plaintiff which was being litigated in stages and which caught the defendant off guard. This occasioned prejudice to the defendant. The fact that the learned JC considered all the additional allegedly defamatory statements and found them to be defamatory compounded matters further, resulting in a miscarriage of justice. We are therefore constrained to intervene in an appellate capacity.
>
> [84] The trial of the matter ought to have been confined to the single allegedly defamatory statement pleaded in the statement of claim.

[81] It is an established fact that from the time of the filing of encl. 13 until the hearing of the application in encl. 36 to amend the statement of claim on 20 August 2024 – an interval of approximately six months – no less than five case managements were conducted for this suit. As pointed out by the defendants, at none of these case managements did the plaintiffs state that they were contemplating an application to amend the statement of claim.

[82] This court also notes that encl. 36 was only filed one day before the hearing date of encl. 13. The reason given by the plaintiffs was that their counsel had discovered the errors in their pleadings the weekend prior to such hearing.

[83] Coupled with the fact that the plaintiffs had also previously caused the hearing of encl. 13 to be adjourned on at least two occasions (where in one of those occasions, this court granted costs to the defendants in the sum of RM2,000 as the plaintiffs' solicitors failed to turn up for the hearing (despite the court date being fixed almost a month prior during case management), this court is persuaded by the argument that this is a tactical manoeuvre to delay the hearing of encl. 13 and/or to delay encl. 13's disposal.

[84] On the authorities of the cases referred to in para. [67] above and the case of *Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606; [1988] 3 MLJ 348; [1998] 1 MLRH 186 as cited by the Federal Court in *Hong Leong Finance*, the application in encl. 36 ought not to succeed

[85] Although the plaintiffs' claim in defamation was bound to fail based on the original statement of claim, it was always open to the plaintiffs to make the relevant amendments. This court would not have denied the plaintiffs the opportunity to amend the statement of claim had they done so before or immediately after the filing of encl. 13. However, the plaintiffs chose to file their application on the eve of the hearing on encl. 13 and they are to bear the consequences.

[86] The application in encl. 36 is disallowed.

[87] As a consequence of the dismissal of encl. 36, the application by the third defendant to strike out the third plaintiff's in encl. 13 is allowed.

[88] The plaintiffs to pay costs of RM30,000 to the defendants, subject to allocatur.